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Attorneys for Plaintiff and Counterdefendant,  
 AT&T CORP.

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

AT&T CORP.,

Plaintiff,

v.

DATAWAY INC. and dba DATAWAY  
 DESIGNS,

Defendants.

AND RELATED COUNTERCLAIM.

Case No. C07-02440 MMC

OPPOSITION OF PLAINTIFF AND  
 COUNTERDEFENDANT AT&T CORP.  
 TO EX PARTE MOTION OF  
 DEFENDANT AND COUNTER-  
 CLAIMANT DATAWAY INC. FOR  
 ORDER CHANGING TIME FOR  
 HEARING ON MOTION OF  
 DEFENDANT AND COUNTER-  
 CLAIMANT DATAWAY INC. FOR  
 SANCTIONS AND OF DISPOSITIVE  
 MOTION FILING DEADLINE;  
 REQUEST FOR AWARD OF  
 ATTORNEY'S FEES AND EXPENSES  
 AGAINST DATAWAY INC. AND  
 ANNE-LEITH MATLOCK, JOINTLY  
 AND SEVERALLY, IN THE SUM OF  
 \$3,500.00; DECLARATION OF  
 TIMOTHY CARL AIRES

[F.R.C.P., Rule 6]

DATE: July 22, 2008  
 TIME: 9:30 a.m.  
 CTRM: E, 15<sup>th</sup> Floor

Plaintiff and Counterdefendant AT&T Corp. hereby submits its opposition to the  
 motion of Defendant and Counterclaimant Dataway Inc. for order changing time for hearing  
 on motion for sanctions and of dispositive motion filing deadline, and its separate request for  
 award of attorney's fees and expenses against Dataway Inc. and Anne-Leith Matlock, jointly  
 and severally, in the sum of \$3,500.00, as follows:

OPPOSITION MEMORANDUM

1. THE "EX PARTE MOTION TO SHORTEN TIME AND TO EXTEND TIME" IS NOT SUPPORTED BY GOOD CAUSE

An application to shorten time must show good cause why the moving party should be allowed to "go to the head of the line in front of all other litigants and receive special treatment." [*Mission Power Engineering Co. v. Continental Cas. Co.* (CD CA 1995) 883 F.Supp. 488, 492.]

It must be established that the moving party is without fault in creating the crisis or that the crisis occurred as a result of excusable neglect: "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have ..." [*Mission Power Engineering Co. v. Continental Cas. Co.* (CD CA 1995) 883 F.Supp. 488, 492; *see also In re Intermagnetics America, Inc.* (CD CA 1989) 101 B.R. 191, 193.]

Ex parte applications for extensions of time are proper only if the prescribed time period has not yet expired. [*F.R.C.P. Rule 6(b)(1)(A).*]

Discovery other than experts closed April 15, 2008. Expert disclosures are to be made by July 15, 2008. All expert discovery is to be completed August 15, 2008. A pre-trial conference is set for September 16, 2008. Jury trial is set for October 20, 2008. The dispositive motion filing deadline was July 1, 2008. The last day for the hearing of dispositive motions is August 5, 2008. AT&T timely filed a Rule 56 motion – the only Rule 56 motion currently pending before this Court.

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1 A settlement conference was initially set for June 23, 2008. The settlement  
2 conference was continued to September 3, 2008 and then advanced to July 8, 2008 – The  
3 date on which it was actually held. Shortly after the settlement conference commenced,  
4 defense counsel's office began e-filing documents with the Court. At approximately 3:30  
5 p.m., defense counsel filed a motion for sanctions contending that AT&T's court-ordered  
6 production of documents on May 27, 2008 was allegedly deficient and that a privilege log  
7 served May 27, 2008 was allegedly inadequate.

8  
9 This Court previously ordered AT&T to produce certain records and a privilege log  
10 by May 27, 2008. In its order, the Court allowed AT&T to categorize (as opposed to itemize)  
11 privileged documents and relieved AT&T of any obligation to produce again documents  
12 previously produced with Rule 26(a) and (e) disclosures. Following the Court's discovery  
13 order, AT&T timely produced the additional records requested save and except "privileged  
14 matter" and served a privilege log. AT&T also timely served a "further written response".  
15

16 Between May 28, 2008 and June 16, 2008, AT&T heard nothing from defense counsel  
17 regarding the document production and the privilege log. On June 17, 2008, AT&T's  
18 counsel spoke with defense counsel at length on the subject of her alleged concerns with the  
19 document production and the privilege log. Counsel spoke for no less than 45 minutes. At  
20 no time did defense counsel ever ask for an extension of the time within which to file a  
21 dispositive motion. Any suggestion to the contrary is counterfactual. AT&T's counsel then  
22 summarized the discussion in an e-mail to defense counsel, stating as follows:  
23

24 "We talked this afternoon for about 45 minutes about the  
25 privilege log and the production. You seemed surprised that the  
26 Court order on your discovery motion allows me to categorize,  
27 rather than itemize, materials that are subject to objection. I  
28 asked you to give me a recognized definition of "category" and

1 an example of how you want me to prepare the privilege log and  
2 I would consider it. I asked you to articulate for me how a more  
3 specific itemization would benefit anyone and I would consider  
4 it. *I suggested to you that an informal conference with the*  
5 *Court, rather than more expensive law and motion practice,*  
6 *might prove beneficial.* You asked me for the table of contents  
7 for the manuals my client produced. I told you I would look for  
8 them. As it turns out, you already have the tables of contents in  
9 the production as ATT240 and ATT412. We agreed to speak  
10 again in several days. Thank you."

11  
12 AT&T's counsel did not hear from defense counsel on the subject of the production  
13 and the privilege log again until the pending sanction motion was filed on July 8, 2008 during  
14 the settlement conference. Twenty-one days and the dispositive motion filing deadline all  
15 passed without a whisper from defense counsel.

16  
17 AT&T has produced all non-privileged responsive documents and served a privilege  
18 log consistent with what AT&T believes to be the letter and spirit of the Court's discovery  
19 order of May 20, 2008. Any attempt to address the production and the privilege log should  
20 have been made prior to July 1, 2008. Any attempt to extend the dispositive motion deadline  
21 should also have been made prior to July 1, 2008. Defense counsel's motion is an attempt  
22 to misuse the discovery process to obtain an unfair advantage in this litigation and an attempt  
23 "to save the day for [a] part[y] who ... failed to present requests when they should have ..."  
24 The denial of relief on this record would not be an abuse of discretion.

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2. CONCLUSION

For the foregoing reasons, the motion of Defendant and Counterclaimant Dataway Inc. for order changing time for hearing on motion of Defendant and Counterclaimant Dataway Inc. for sanctions and of dispositive motion filing deadline should be denied. Further, an award of attorney's fees and expenses against Dataway Inc. and Anne-Leith Matlock, jointly and severally, in the sum of \$3,500.00 is warranted as the pending motion should never have been presented.

DATED: July 9, 2008

AIRES LAW FIRM

By: 

Timothy Carl Aires, Esq.  
Attorney for Plaintiff and Counterdefendant,  
AT&T CORP.